No. 81-2341

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HARVEY KUDLER and MARCIA KUDLER,

Petitioners,

VS.

MALLORY IRA SMITH,

Respondent,

and regarding,

BRIAN ALEXANDER SMITH and
VANESSA LAUREN SMITH,

Children.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This brief is filed on behalf of the Respondent in opposition to the Petition for Certiorari herein.

STATEMENT OF THE CASE

On May 1, 1978, custody of Brian Alexander Smith and Vanessa Lauren Smith was awarded to their natural father, Mallory Ira Smith, who is the respondent herein. The custody order was made by the Supreme Court of the State of New York for Queens County, New York. The New York court also ordered visitation every other Sunday between the children and the maternal grandparents, Harvey Kudler and Marcia Kudler, who are the petitioners herein. At the time the New York order was entered, the father, children and grandchildren all were domiciled in New York. The findings of fact and orders of the New York court are

set forth verbatim at Appendix "D" of the Petition for Certiorari.

Subsequently, the respondent moved to Colorado with the children and established a new domicile in that state. The record does not disclose exactly when the family moved. On December 5, 1979 and March 13, 1980, respectively, the petitioners filed in the District Court for Jefferson County, Colorado a Petition and a Motion for Order in re Visitation and Other Relief by which the petitioners requested the Colorado court to enforce and modify the visitation rights contained in the New York custody order. The Petition and Motion are set out verbatim at Appendices "A" and "B" to this brief, respectively. On May 29, 1980, the petitioners filed a Motion to Amend Petition, which appears at Appendix "H" of the Petition for Certiorari. The

Motion to Amend Petition was granted by the Colorado court, and the petitioners were allowed by the Colorado court to file their Amended Petition, which appears at Appendix "I" of the Petition for Certiorari. By their Amended Petition, the petitioners requested that, in addition to the relief requested in their Petition and Motion in re Visitation and Other Relief, they be granted visitation rights under Section 19-1-116, C.R.S. 1973 (Supp. 1981). Section 19-1-116, which appears at Appendix "M" of the Petition for Certiorari, became effective April 10, 1980. Section 19-1-116(2) empowered Colorado courts to grant visitation rights to certain grandparents when visitation was in the best interests of the grandchildren; the statute also provided for termination of such visitation rights when required by the grand-

children's best interest. 1973 C.R.S. § 19-1-116(4) (Supp. 1981).

On June 13, 1980, the Colorado district court heard the evidence in support of the Amended Petition and the Motion in re Visitation and Other Relief. At the conclusion of the hearing, the court determined that it was in the best interest of the grandchildren that there be no visitation between them and the petitioners, and accordingly ordered that there be no further visitation. The findings and decision of the Colorado district court appear at Appendix "C" of the Petition for Certiorari. On appeal to the Colorado Court of Appeals, the decision of the district court was affirmed. Kudler v. Smith, 643 P.2d 783 (Colo. App. 1981) (The opinion also appears at Appendix "B" of the Petition for Certiorari). Rehearing was denied

on October 29, 1981, and certiorari was denied by the Colorado Supreme Court on April 5, 1982.

SUMMARY OF ARGUMENT

The Colorado court did not, by modifying visitation rights contained in a New York custody decree, deny full faith and credit to the decree when, under the law of New York, the decree was subject to modification. The Colorado court had jurisdiction over the parties and subject matter of this action. It was not obligated to decline to exercise its jurisdiction in deference to the courts of New York when the facts which might have led the Colorado court to decline to act are asserted for the first time in this Court. A custody decree entered on June 13, 1980 is unaffected by 28 U.S.C. §1738A which

was not enacted until December 28, 1980.

ARGUMENT

The Petition for Certiorari asserts that this Court should decide this case because the Colorado courts, by denying the petitioners' asserted right to visitation, failed to give full faith and credit to the judgment of a New York court by which such visitation had been ordered.

I. THE FULL FAITH AND CREDIT CLAUSE DOES NOT PRECLUDE A COLORADO COURT FROM MODIFYING A NEW YORK CUSTODY DECREE WHEN THE DECREE IS SUBJECT TO MODIFICATION UNDER NEW YORK LAW.

The decisions of this Court have established the rule that a child custody order of a state has no constitutional claim to a more conclusive or final effect in the courts of a sister state than would be accorded the same order in the courts of the state in which the order was rendered.

Ford v. Ford, 371 U.S. 187, 192, 194 (1962); Halvey v. Halvey, 330 U.S. 610, 614 (1947). Therefore, a Colorado court was not precluded by the Full Faith and Credit clause from modifying or terminating the petitioners' visitation rights if the petitioners' rights could have been modified or terminated under New York law.

Under New York law, a custody order is modifiable when, after a full hearing, it appears that modification is proper because of changed circumstances or because the best interests of the children will thereby be served. New York Domestic Relations Law § 240 (McKinney, Supp. 1982) (Appendix "C"). A change of residence, such as occurred in this case, is a sufficient change of circumstances so as to require a New York court to modify visitation provisions contained in an earlier

order. Evans v. Evans, 419 N.Y.S.2d 11, 12 (1979); cf. People ex rel. Smith v. Kudler, 418 N.Y.S. 2d 158 (1979)(implicitly recognizing the power of the New York courts, upon proper application and hearing, to modify the very New York custody order at issue in this case); see also Wilder v. Wilder, 402 N.Y.S.2d 559 (1978)(New York courts have inherent power to modify visitation provisions in light of child's best interest).

From the foregoing, it is evident that the Colorado district court was not precluded by the Full Faith and Credit Clause of the United States Constitution from modifying the petitioners' visitation rights.

II. THE COLORADO COURT HAD JURISDICTION OVER THE SUBJECT MATTER AND THE PARTIES.

The Colorado Uniform Child Custody

Jurisdiction Act, §14-13-101 et seq., C.R.S. 1973, defines the circumstances under which Colorado courts may assume jurisdiction to modify a custody determination of another state. Section 14-13-104(1) of the Act provides that:

> A court of this state . . . has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (a) This state is the home state of the child at the time of commencement of the proceeding . . . ; or [emphasis added]
>
> (b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and his parents, or the child and at least one contestant, have a significant connection with this state and there is available in this state substantial evidence concerning the child's present or future care, protection, training and personal relationships . . .

There is no dispute in this case that the Colorado court had jurisdiction over all the parties. From the record,

it is clear that the Colorado courts also had jurisdiction over the subject matter under Section 14-13-104(1)(b). By the time the petitioners filed their Motion in re Visitation and Other Relief on March 13, 1980 and their Amended Petition on May 29, 1980, the alternative jurisdictional requirements of Section 14-13-104(1)(a) were also met as to the relief sought therein. Furthermore, Section 19-1-116(2), C.R.S. 1973 (Supp. 1981), empowers Colorado courts to modify or terminate grandparents' visitation rights "whenever such order would serve the best interest of the child [emphasis added]".

Having invoked the jurisdiction of the Colorado court, the petitioners now argue for the first time in this Court that the Colorado courts lacked jurisdiction to modify petitioners' visitation rights because the children had resided

in Colorado less than six months. In support of their contention, the petitioners have appended to their Petition for Certiorari transcribed excerpts from a hearing in New York in which it is implicit that six months prior to the filing of the Petition in Colorado, the children were still residents of New York. See Appendix "N" of the Petition for Certiorari. The petitioners' argument appears to be that, by virtue of Section 14-13-115, C.R.S. 1973, which appears at Appendix "P" of the Petition for Certiorari, the Colorado courts lacked jurisdiction over the subject matter. Never during the hearing in the trial court nor in their briefs on appeal to the Colorado Court of Appeals did the petitioners argue that the Colorado courts lacked subject matter jurisdiction because of the short duration of the grandchildren's residency in Colorado. Furthermore, the petitioners' attack on

the jurisdiction of the Colorado courts rests on the assumption that the Amended Petition, which was filed May 29, 1980, and the Motion in re Visitation and Other Relief, which was filed on March 13, 1980 and which alleged that the children had resided in Colorado for six months, should, for all other purposes, be deemed retroactive to December 5, 1979 - - the date the Petition was filed. Never until the Petition for Certiorari was filed herein was this issue or the need to resolve it asserted in the Colorado courts.

Moreover, the fact that the children's Colorado residence may have been less than six months does not deprive the Colorado courts of their subject matter jurisdiction. The Colorado Supreme Court has determined that the courts of Colorado always have jurisdiction over matters affecting children in Colorado. See Roberts

v. District Court, 596 P.2d 65, 68 (Colo. 1979). Section 14-13-115, supra, requires only that a Colorado court shall decline the exercise of its jurisdiction under the circumstances stated in the statute. Section 14-13-115(1) provides in pertinent part:

> If a court of another state has made a custody decree, a court of this state shall not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction . . . and the court of this state has jurisdiction.

From the pleadings and facts presented, especially the petitioners' own allegation in their Motion in re Visitation and Other Relief that the children had resided in Colorado for more than six months, it unquestionably appeared to the Colorado court that it had jurisdiction,

and that New York had lost jurisdiction. The Colorado court was therefore under no statutory obligation to refrain from the exercise of its otherwise lawful jurisdiction.

III. THE PROVISIONS OF 28 U.S.C §1738A DO NOT APPLY TO THIS CASE.

The Colorado courts' authority to modify or terminate the petitioners' visitation rights was unaffected by 28 U.S.C. §1738A, which appears at Appendix "L" of the Petition for Certiorari. That statute was enacted on December 28, 1980, long after this case was decided on June 13, 1980.

CONCLUSION

For the above and foregoing reasons, the respondent requests that the Petition

for Certiorari be denied. Respondent also requests, pursuant to Rule 49.2 of the Supreme Court Rules, that he be awarded damages in the amount of $3,000.00 or such other amount as this Court deems appropriate to defray the respondent's reasonable expenses and fees incurred in connection herewith, on grounds that the Petition for Certiorari is frivolous.

Respectfully Submitted,

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APPENDIX "A"

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No 79DR3109

HARVEY KUDLER and MARCIA KUDLER, Petitioners vs. MALLORY IRA SMITH, Respondent, And Regarding BRIAN ALEXANDER SMITH and VANESSA LAUREN SMITH, Children	PETITION

COMES NOW the above named Petitioners by and through their attorneys of record and SHOW THE COURT as follows:

1. The Petitioners are the maternal grandparents of the children, Brian Alexander Smith and Vanessa Lauren Smith, and as

such have been granted certain vested rights of visitation with the minor children under a valid and existing Order and Judgment of the Supreme Court of the State of New York, County of Queens, entitled People Ex Rel: Mallory Smith, Petitioner, against Harvey Kudler and Marcia Kudler, Respondents, Judgment Index: 7496/77, an exemplified copy of which is on file with this Court and is also attached hereto and made a part hereof as if set forth in full, marked as "Exhibit A".

2. By virtue of the aforesaid Order and Judgement the Petitioners herein are entitled to certain rights of visitation with the minor children as set forth more specifically in that Order.

3. The herein Respondent, Mallory Ira Smith, has deliberately, willfully,

maliciously, and with intent to deprive the Petitioners of those visitation rights has for a period of greater than six months removed the children from the State of New York under the pretext of taking a vacation and failed and refused to return the children to the State of New York as required by the New York Court and has secreted the children from the Petitioners and the New York Court.

4. The Respondent is a man with past history of violence and the Petitioners fear that unless Relief be granted as prayed for hereinafter in the form of a Writ of Habeus Corpus and Writ of Ne Exeat the Respondent will immediately upon acquiring knowledge of the pendency of this action flee the jurisdiction of the Courts of the State of Colorado and take the children with him in an effort to further obstruct justice.

5. The Respondent is presently residing in a trailer court in the vicinity of 52nd and Saulsbury in Arvada, Colorado, a location within the County of Jefferson and State of Colorado.

6. The Petitioners further inform this Honorable Court that an arrest warrant for the Respondent is presently outstanding in the State of New York by virtue of a "Warrant of Attachment", a copy of which is attached hereto and made a part hereof as is set forth in full, wherein the arrest of the herein Respondent is Ordered by Virtue of Respondent's disobedience of the Judgement and Orders of the New York Court involving visitation.

7. The Petitioners further allege that the Respondent stands in defiance of the Court Order and Judgement regarding

visitation and, unless appropriate relief is granted by the present Court, will defy this Honorable Court in its efforts to enforce the Orders and Judgements of a sister State.

WHEREFORE, Petitioners pray that this Honorable Court make such Orders that are necessary to enforce the provisions of the Judgement and Order rendered by the Supreme Court of the State of New York in the actions as set forth herein and above to provide for visitation on the part of the Petitioners with the minor children. Further, that this Court make inquiry into the matters set forth herein and above and render such Judgement and Orders as are necessary to prevent the Respondent from removing the children from the State of Colorado and to compel the Respondent to allow the Petitioners herein to obtain such visitation under the terms and conditions as may be

decreed just in the premises.

Petitioners further pray that a monetary judgement enter against the Respondent for attorneys' fees and costs as may seem just in the premises.

Respectfully submitted,

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APPENDIX "B"

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 79DR3109, Div. 7

HARVEY KUDLER and MARCIA KUDLER, Petitioners	)	
vs.	)	
MALLORY IRA SMITH, Respondent	)	MOTION FOR ORDER IN RE VISITATION AND OTHER RELIEF
And Regarding	)	
BRIAN ALEXANDER SMITH and VANESSA LAUREN SMITH, Children.	)	

COMES NOW the above named Petitioners, by and through their attorneys of record, Bohm, Connell and McLellan, and SHOW THE COURT as follows:

1. The Petitioners are the maternal grandparents of the children, Brian Alexan-

der Smith and Vanessa Lauren Smith, and as such have been granted certain rights of visitation with the minor children under a valid and existing Order and Judgment of the Supreme Court of New York, County of Queens, entitled People Ex Rel: Mallory Smith, Petitioner, against Harvey Kudler and Marcia Kudler, Respondents, Judgment Index: 7496/77, an exemplified copy of which is on file with this Court and is made a part hereof as if set forth in full.

2. By virtue of the aforesaid Order and Judgment the Petitioners herein were and are entitled to visitation with the minor children as set forth specifically in the aforesaid Order.

3. The children are and have been for a period greater than six months residents of the State of Colorado residing with their father, the Respondent herein.

4. The Respondent and the children reside at 5837 Pierce Street, Arvada, Colorado, Apt. #101. The Petitioners reside at 178-06 69th Avenue, Flushing, New York, 11365.

5. Due to the lack of proximity between the Petitioners and the residence of the children the Order of the Court of New York setting forth terms and conditions of visitation cannot be reasonably exercised by the Petitioners.

6. That despite intensive negotiations between the Petitioners and the Respondent concerning the same no agreement has been arrived at between the Petitioners and the Respondent as to the terms and conditions governing any visitation or communication between the Petitioners and the children.

7. The Respondent has failed and refused to allow visitation or communication between the Petitioners and the children and such refusal is contrary to the intent of the Order of the Supreme Court of the State of New York.

8. The Order of the Supreme Court of the State of New York as set forth hereinabove is entitled to full faith and credit by the courts of Colorado.

9. It is in the best interest of the children that such visitation both within the State of Colorado and with the Petitioners in the State of New York together with periodic communication both by telephone and by letters be allowed.

WHEREFORE, Petitioners pray that a hearing as to the matters complained of

herein be had and that an Order enter allowing the Petitioners visitation under reasonable times, terms and conditions be had with the children both in the State of Colorado and in the State of New York; that the Petitioners be allowed access to the children both by telephone and by mail under reasonable terms, times and intervals; and for such other and further relief as the Court may deem just in the premises.

Respectfully submitted,

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APPENDIX "C"

N.Y. DOMESTIC RELATIONS LAW
(McKinney, Supp. 1982)

§240. Custody and maintenance of children
1. In any action or proceeding brought . . . to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court must give such direction, between the parties, for the custody, care, education and maintenance of any child of the parties, as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child . . . . Such direction may provide for reasonable visitation rights to the maternal and/or paternal grandparents of any child of the parties . . . . Upon the application of either parent, or of any other person or party having the care, custody and control of such child pursuant to such judgment or order, after such notice to the other party or parties or persons having such care, custody and control and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or final judgment . . . .